

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 05-0106P
Withholding Tax
For Period 09/01/2004 – 10/31/2004

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ISSUE

I. Tax Administration- Ten Percent (10%) Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b)(c).

The taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

The taxpayer was assessed a 10% negligence penalty for the late payment of Withholding Taxes for the periods ending 05/31/2004 through 10/31/2004. The initial protest of the liabilities was filed on February 8, 2005. At the time the protest was filed, the statutory time limitation to protest the notices issued for the periods ending 05/31/2004-08/31/2004 had passed. Therefore, this Letter of Findings will only address the protest for the periods ending 09/30/2004-10/31/2004.

For Indiana withholding tax purposes, the taxpayer is an early filer.

I. Tax Administration- Ten Percent (10 percent) Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10 percent) negligence penalty imposed for the late filing of its withholding tax returns pursuant to IC 6-8.1-10-2.1.

The taxpayer utilizes an outside tax service which is responsible for the filing and payment of the Indiana withholding taxes. The service provider is acting in an agency capacity for the taxpayer with full authority to do so concerning the filing and payment of these taxes. The actions of the agent acting on behalf of the taxpayer are viewed the same as if they were the actions of the taxpayer itself.

The tax service company which previously took care of the taxpayer's withholding taxes (hereinafter TS1) was subsequently purchased by another tax service company

(hereinafter TS2).

Per the taxpayer's protest, the taxpayer's service provider, TS1 had the taxpayer's filing status information encoded in its computer programming so that the payments and returns were automatically filed at the correct time. However, this information was "invisible" to TS2 when the acquisition took place. When TS2 purchased TS1, there were differences in the interpretation of the terminology used, and TS2 did not realize that the taxpayer was an early filer.

Indiana Code 6-3-4-8.1 outlines the requirements to be an early filer. Under this statute, any entity which had an average monthly remittance due in the preceding year which was greater than \$1,000 is required to make payment of the tax no later than 20 days after the end of the month for which the remittance is due. For the periods in question, the taxpayer's monthly remittances were in excess of \$1,000,000.

TS2 performs a monthly data exchange with the Department concerning the filing status of their clients. A list is sent to the Department and if an account ID number is incorrect, when the list is returned to the taxpayer it is flagged as having an error. However, once an error is flagged, it is followed up with a letter from the TS2 to their client to determine the correct ID number and in this case; the process to rectify the error apparently took several months.

The taxpayer also attempts to shift responsibility for the late payments to the Department. The taxpayer states that the Department normally would issue billings within one month of a return being late, and this would have notified TS2 that there was a problem with the payments sooner, so as to mitigate their penalties cost. The Taxpayer states that the Department had problems with its billing system and billings were not issued for several months.

The Department does not find this argument to be persuasive. Indiana Code 6-8.1-5-2 provides that a notice for additional tax due may be issued within 3 years from the latest of the due date of the return or the date the return is filed. Whether a billing is issued one month after a return is filed or in three years, this does not shift the responsibility for negligence from the taxpayer to the Department.

The Department further finds that there were numerous errors made by the taxpayer through their agent, TS2. Initially, there is the failure to correctly handle the transition of information from the previous service provider. This is compounded by the failure to recognize that the high dollar withholding remittances were required to be filed as an early filer in accordance with existing Indiana statutes. Finally, the crosscheck in place by TS2 also failed as a result of errors made in the recording of the taxpayer ID number.

IC 6-8.1-10-2.1 requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer."

IC 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed"

Taxpayer has not set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Therefore, given the totality of all the circumstances, reasonable cause has not been demonstrated as required to permit waiver of the penalty.

FINDING

The taxpayer's protest is denied.

RW/TG/DK 06/24/07